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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM Docket No. 88-577
)	
LIBERTY PRODUCTIONS,)	File No. BPH-870831MI
A LIMITED PARTNERSHIP)	
)	
Et. Al.)	
)	
For Construction Permit for		
New FM Channel 243C3		
Biltmore Forest, North Carolina		

To: The Commission

OPPOSITION TO
PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its opposition to the Petition for Reconsideration and/or Clarification, filed by Sutton Radiocasting Corporation ("SRC") on June 13, 2001 in the above referenced proceeding. In support whereof the following is shown:

1. SRC seeks reconsideration and/or clarification of Commission's Memorandum Opinion and Order (FCC 01-129), released May 25, 2001 in the above proceeding. SRC seeks reconsideration and/or clarification with respect to one narrow aspect of the Memorandum Opinion and Order -- it seeks in effect a ruling that the Commission did not accept Liberty's November 10, 1999 amendment to the extent that it proposed a one-step upgrade from class A to class C3 facilities and, accordingly, that the facilities specified in SRC's January 17, 2001 application

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(BPH-20010117ACJ) are not required protect the reference coordinates for 243C3 at Biltmore Forest, North Carolina. Liberty opposes the Petition. As discussed below, Liberty's November 10, 1999 amendment was filed as of right and properly included a one-step upgrade proposal pursuant to the express provisions of 47 CFR 73.3573(a)(1).

2. SRC first advances the argument that the Commission's Rules and precedent prohibited the submission of a one-step upgrade proposal in the context of Liberty's November 10, 1999 amendment. This argument is entirely without merit.

3. SRC argues that 47 CFR 73.203(b) precludes acceptance of the amendment. However, SRC's implausible interpretation of Section 73.203(b) would preclude any one-step upgrade proposal, not simply those that are submitted in the context of post-auction longform applications. Obviously, 47 CFR 73.203(b) must be read in the context of the rest of the Commission's Rules and clearly does not preclude the submission of one-step upgrade proposals, otherwise submitted in accordance with the Rules.

4. SRC acknowledges (at Note 8) that 47 CFR 73.3573(a)(1) provides for the submission of one-step upgrade proposals in the context of post-auction longform applications, but contends that this provision of the Rules is inapplicable to that limited class of applications which were filed prior to July 1, 1997 and, thus, are subject to 47 USC 309(1). SRC offers no precedent or other authority in support of this novel contention. Indeed, contrary to SRC's claim, the provisions of 47 USC 309(1) preclude any such

conclusion.

5. 47 USC 309(1) was enacted to address certain special issues relating to the application of competitive bidding to pending comparative licensing cases. Specifically, it limited such bidding to existing applicants in those cases and it directed the Commission to implement a special 180-day settlement window for those applicants. It also emphasized that the Commission had the authority to utilize competitive bidding in those cases "pursuant to subsection (j) of this section". It imposed no other limitations on the Commission's use of established auction procedures in these cases.

6. In the context of implementing its expanded auction authority, the Commission revised 47 CFR 73.3573(a)(1) to provide in pertinent part that "Longform applications submitted pursuant to Sec. 73.5005 of this part for a new FM broadcast service may propose a higher or lower class adjacent channel, intermediate frequency or co-channel." See: First Report and Order (FCC 98-194), 63 FR 48615 (November 11, 1998) at Appendix C. Nothing in the First Report and Order suggests that the provisions of 47 CFR 73.3573(a)(1), as therein revised, were not intended to apply with respect to applications filed prior to July 1, 1997. Nor has SRC advanced any rationale for restricting the application of the Rule in that manner.

7. SRC's reliance upon the Report and Order in the Hornbrook, California case, (DA 01-274), released February 9, 2001, is misplaced for two reasons. First, that case did not

involve post-auction applications or amendments. Second, the version of 47 CFR 73.3573(a)(1) that was in effect at the time the applications at issue in that case were filed, only allowed licensees, permittees, and first-come, first-serve applicants to file one-step upgrade proposals. The Commission emphasized in the Hornbrook, California case that the old version of the rule "did not permit mutually-exclusive applicants for a new FM channel" "to file an application or an amendment to upgrade." See: DA 01-274, at paragraph 5.

8. The current version of 47 CFR 73.3573(a)(1) was adopted prior to the submission of Liberty's November 10, 1999 amendment See: First Report and Order in (FCC 98-194), 63 FR 48615 (November 11, 1998) at Appendix C. It explicitly provides that "Longform applications submitted pursuant to Sec. 73.5005 of this part for a new FM broadcast service may propose a higher or lower class adjacent channel, intermediate frequency or co-channel." 47 CFR 73.3573(a)(1). Liberty's November 10, 1999 amendment was filed pursuant to 73.5005 and was entirely consistent with the provisions of 47 CFR 73.3573(a)(1), as revised.

9. To the extent that SRC argues that the Memorandum Opinion and Order's silence as to the one-step upgrade and repeated references to the frequency at issue as Channel 243A evidence an intent to accept only the site-change, its arguments are unpersuasive. The Commission accepted Liberty's properly submitted amendment without qualification. Likewise, it granted Liberty's application, as amended, without qualification insofar

as the November 10, 1999 amendment is concerned. Accordingly, in the absence of any limitation or qualification the Commission must be deemed to have accepted the amendment, as filed, in its entirety, including the one-step upgrade.

10. Furthermore, SRC's contention that the Commission intended to accept the amendment only to the extent that it proposed a change in transmitter site simply is not plausible. The Commission could not have accepted the amendment as a change in site only, because that is not what the amendment proposed. Inasmuch as the amendment contained no proposal for class A facilities at the new transmitter site, it could not have been accepted or granted as a class A proposal.

11. SRC's contention that the acceptance of the one-step upgrade proposal contained in Liberty's November 10, 1999 amendment and the grant of its application, as so amended, was unlawful or otherwise not in accordance with the Commission's Rules and precedent is entirely without merit. Both the Rules and precedent fully support the Commission's action in accepting Liberty's amendment, as filed, and granting its application, as amended. Therefore, SRC's Petition must be denied.

12. Nevertheless, Liberty has no interest in the dismissal of SRC's pending application. Accordingly, Liberty is currently in discussions with SRC in hopes of developing a mutually acceptable technical solution to the current conflict between the facilities proposed in SRC's application and the reference coordinates for Channel 243C3 at Biltmore Forest. Liberty

believes that the parties will be able to present such a solution to the Commission in the near future, which will provide for the resolution of the conflict and allow for the grant of SRC's application. In that regard it is noted that the Enforcement Bureau in a Motion filed June 15, 2001, sought an extension of time until July 11, 2001 in which to submit its response to SRC's Petition. Liberty anticipates it will be able to submit the proposed solution prior to that date, along with a request, submitted jointly with SRC, seeking the implementation of the proposed solution, the grant of SRC's application and the dismissal of SRC's Petition, as moot.

WHEREFORE, premises considered, the Petition for Reconsideration and/or Clarification, filed by SRC, should be DENIED.

Respectfully Submitted

LIBERTY PRODUCTIONS,
A LIMITED PARTNERSHIP

By: 

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June 27, 2001

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 27th
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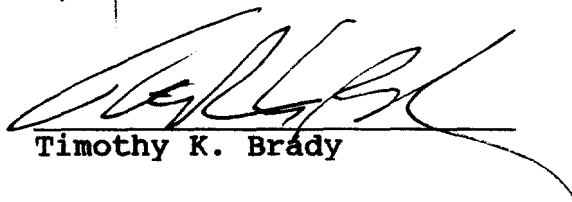
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